

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Divorce Case 62 of 2005

S.T.A.M.....PETITIONER

VERSUS

A.M.....RESPONDENT

B..... CO-RESPONDENT

JUDGEMENT

This is a petition for divorce on grounds of desertion and adultery. The Petitioner claims in her petition that on or about the 29th February 2000 the first Respondent deserted the matrimonial home and went to live in another house about 4 kilometers away with the second Respondent with whom he has committed adultery since then.

The first Respondent on the other hand denies in his answer to Petition and cross-petition that he deserted the matrimonial home and states that it is the Petitioner who is guilty of desertion. Prior to the desertion the first Respondent claims that the Petitioner was cruel to him in that she assaulted him and frequently ridiculed him in public thus embarrassing him. On those grounds he has cross-petitioned for divorce.

The parties celebrated their marriage at the Registrar of Marriages Office at Mombasa on the 4th September, 1998. Thereafter they resided and cohabited at Ukunda up to 2000 when the marriage went sour. According to the Petitioner as stated in her Petition they have one child born to them. In her evidence however she admitted that the child was not sired by the first Respondent. She claimed that at the time of marriage she was pregnant by another man and when the child was born the first Respondent accepted him and took him as his own child. She further stated that even after separation the first Respondent paid to her Ksh. 7,500/= per month as maintenance for the child. Now she does not claim any maintenance for herself or for the child. All she wants is an order of divorce.

In his testimony the first Respondent admitted that he has since 29th February 2000 lived and cohabited with the second Respondent. He said this is because the petitioner led him to believe that she was carrying his child but after the child was born it was clear from his complexion that he was not sired by him. He felt cheated and that was the start of their problems. On 1st June 1999 she assaulted him with a knife and thereafter she was violent to him especially when she was drunk.

From the testimony of the parties, it is clear to me that the cause of their problems was the Petitioner's child who was admittedly not sired by the first Respondent. I believe the first Respondent's evidence that in January 2000 the Petitioner went to the matrimonial home with a pick-up and took away all her belongings and even some of the first Respondent's. He has however not proved the ground of cruelty as he did not produce any medical evidence to prove that he was indeed injured on 1st June 1999. Even if he was indeed assaulted by the Petitioner on that day I find that that act of cruelty was condoned as he continued having sexual relations with the Petitioner until 2000.

The first Respondent also readily admitted having committed adultery with the Second Respondent. He said he has since February 2000 been living with her.

In the circumstances, I find that the Petitioner has proved the ground of adultery but failed to prove desertion. I also find that the first Respondent has proved the ground of desertion but failed to prove the one of cruelty.

The parties have been separated since 2000. The first Respondent has since then been living with the Second Respondent. In the result I find that the marriage between the Petitioner and the first Respondent has irretrievably broken down. I therefore order it dissolved on the ground of adultery on the part of the first Respondent and on the ground of desertion on the part of the Petitioner. The Petitioner shall have the custody of her child and each party shall bear its own costs.

DATED and delivered this 12th day of October 2006.

D. K. MARAGA

JUDGE